Supreme Court, U.S.
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No. 92-427

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES G. DANNIS, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying Texas law, instead of Mississippi law, to plaintiff's suit to recover a deficiency judgment.

2. Whether the court of appeals erred in not addressing a claim waived by petitioners in the district court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988)	6
DeSantis v. *Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990), cert. denied, 111 S. Ct. 755 (1991)	5
EEOC v. *Federal Labor Relations Auth.*, 476 U.S. 19 (1986)	6
Klaxon Co. v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941)	5
Osterneck v. *Ernst & Whinney*, 489 U.S. 169 (1989)	7
Pacific Employers Ins. Co. v. *Industrial Accident Comm'n*, 306 U.S. 493 (1939)	6
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985)	6
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	6
United States v. *Doe*, 465 U.S. 605 (1984)	6

Constitution, statutes and regulations:

U.S. Const.:	
Art. IV, § 1 (Full Faith and Credit Clause)	6
Amend. V (Due Process Clause)	6
Fed. R. App. P. 4(a)(2)	4
Fed. R. Civ. P.:	
Rule 54(b)	7
Rule 59(e)	7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-56) is reported at 958 F.2d 1313. The opinion of the district court (Pet. App. 57-80) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. A petition for rehearing was denied on May 21, 1992 (Pet. App. 2). The petition for a writ of certiorari was filed on August 19, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1985, Northpark Joint Venture (Northpark), a Texas joint venture, borrowed $9,150,000 from Texas State Mortgages, Inc. (TSM) pursuant to a loan agreement and promissory note. The promissory note was secured by a deed of trust that granted TSM a lien on real property located in Mississippi. In addition, the principals of Northpark—including petitioners and Telstar Partnership (Telstar)—executed absolute and unconditional personal guaranties to repay up to $3,202,500 of the $9,150,000 indebtedness. Pet. App. 14-15.

Northpark defaulted on its obligation under the note two years later. TSM then assigned its rights under the note, the deed of trust, and the guaranties to two Texas savings and loan associations (S&Ls), which sold the Mississippi property in a public foreclosure sale for $3,637,500. That sale left an unsatisfied balance due of $3,253,464.96 in principal and $1,200,683.11 in accrued interest. The S&Ls then sued Northpark and its guarantors, including petitioners, in Texas state court to recover the deficiency. The guarantors counterclaimed for a declaration of non-liability under the guaranties. In September 1989, the court granted partial summary judgment against the guarantors, finding them personally liable for $3,202,500 of the unsatisfied indebtedness. The state court then dismissed the suit as to Northpark, which had declared bankruptcy. Pet. App. 15-18.

2. In August 1990, the Resolution Trust Corporation (RTC), as receiver for the two S&Ls,

intervened in the state court action and removed the case to the United States District for the Northern District of Texas. Pet. App. 64. Following removal, petitioners sought reconsideration of the state court's ruling on summary judgment. The district denied that motion by order dated May 20, 1991. Pet. App. 81-84. The court first rejected petitioners' claim that their guarantee of Northpark's "liability" obligated them to pay nothing because Northpark, having obtained a non-recourse loan, was not itself "liable." Because petitioners had "agreed to pay Northpark's 'indebtedness,' " not merely to be liable to the same extent as Northpark, the court concluded that petitioners were required "to ante up." Pet. App. 68.

The court also rejected petitioners' claim that Mississippi law applied to the RTC's right to recover a deficiency judgment. The court noted that while the deed of trust (providing a right to foreclose on the Mississippi property) was governed by Mississippi law, the promissory note expressly provided that it was governed by Texas law. The court concluded that an action to recover a deficiency was not a suit brought under the deed of trust, but a separate action under the guaranties to collect on the note. Although the guaranties did not contain an explicit choice-of-law provision, the court concluded that Texas law governed under the "most significant relationship" test applied by Texas courts to conflicts questions. Pet. App. 68-78.

Petitioners filed a notice of appeal after the order was announced, but before the court actually entered judgment. Four days after that notice was filed, the

district court entered a final judgment in favor of the RTC on its claims, which also denied all other relief not specifically granted. The judgment was broader than the court's earlier order in that it disposed of petitioners' cross-claim against co-guarantor Telstar, which petitioners had claimed had agreed to indemnify them for any liability to the RTC. Petitioners took no further action in the district court.

3. The court of appeals affirmed. The court first concluded that petitioners' premature notice of appeal was effective under Fed. R. App. P. 4(a)(2) to obtain review of the district court's grant of summary judgment. Pet. App. 23-28. The court then concluded that Texas law, and not Mississippi law, governed the RTC's claim for a deficiency. The court rejected petitioners' submission that the RTC's right to a deficiency judgment arose from the Mississippi deed of trust, concluding that an action for a deficiency judgment seeks enforcement of the underlying debt. Pet. App. 33-34. Because the promissory note expressly selected Texas law as the governing law, and because petitioners "agreed to guarant[ee] the enforcement of the note," the court concluded they "essentially ratified the choice of law clause." *Id.* at 35-36. In any event, the court concluded that even "[i]n the absence of an enforceable choice law clause," Texas law applied because the "state that has the most significant relationship to the transaction and the parties in this case is Texas." *Id.* at 37-38.

ARGUMENT

1. Petitioners renew their claim that the district court erred in applying Texas law to the RTC's claim

for a deficiency. They contend (Pet. 34-47) that the court of appeals failed to apply Texas choice-of-law rules, failed to give full faith and credit to Mississippi law, and violated equal protection principles by granting the RTC the "benefits" of a judicial sale governed by Mississippi law without imposing the "burdens" of that law on the RTC's claim for a deficiency judgment. There is no merit to petitioners' claims.

Contrary to petitioners' contention, the court of appeals recognized that "[a] federal court is required to follow the choice of law rules of the state in which it sits." Pet. App. 30 (citing *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941)). The court of appeals likewise recognized the principle of Texas choice of law on which petitioners rely (Pet. 44-45)—*i.e.*, that "in those contract cases in which the parties have agreed to an enforceable choice of law clause, the law of the chosen state must be applied." Pet. App. 30 (citing *DeSantis* v. *Wackenhut Corp.*, 793 S.W.2d 670, 678 (Tex. 1990), cert. denied, 111 S. Ct. 755 (1991)). Petitioners contend, however, that the controlling agreement was the Mississippi deed of trust, not the Texas promissory note. Petitioners are mistaken. The court of appeals correctly concluded that an action for a deficiency following foreclosure is an action on the underlying debt. The deed of trust, which merely secured *part* of the debt owed by petitioners, did not provide a cause of action as to the *balance*. Because the RTC sought to collect from the guarantors the balance outstanding under the Texas promissory note, the court of appeals correctly concluded that Texas law applied to the deficiency

claim. The unanimous conclusion of the courts below concerning which document controlled the legal relations of the parties does not warrant further review by this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n.5 (1985); *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

There is no more force to petitioners' argument that the district court violated the Full Faith and Credit Clause and the equal protection component of the Due Process Clause. Petitioners failed to raise these constitutional arguments below, and the court of appeals accordingly had no occasion to pass on them. This Court should not consider them in the first instance. See, *e.g.*, *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 77-79 (1988); *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986). In any event, petitioners' constitutional claims are meritless. "Neither the Due Process Clause nor the Full Faith and Credit Clause requires [a state] 'to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state.'" *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 822 (1985) (quoting *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939)). Here, even if Mississippi law could rationally apply, Texas could nonetheless constitutionally apply its own law to a debt negotiated and agreed to in Texas by Texas domiciliaries, and which was wholly performable in Texas.

2. Petitioners also contend (Pet. 26-33) that the district court's disposition of their cross-claims against Telstar, and the court of appeals' failure to address the cross-claims in its opinion affirming the

judgment, deprived them of property without due procees of law because they lacked notice that judgment would be entered on the cross-claim. That contention does not affect petitioners' liability to the RTC, but only their ability to recoup the judgment against a third party. In any event, petitioners waived the right to challenge the entry of judgment on the cross-claim.

Petitioners filed a notice of appeal from the district court's order before the court entered a judgment that, by disposing of the cross-claims against Telstar, was broader than the order. Notwithstanding the filing of a premature notice of appeal, petitioners could have been heard on the disposition of the cross-claims by filing a motion pursuant to Fed. R. Civ. P. 59(e) "to alter or amend the judgment" to reflect the fact that claims between petitioners and Telstar remained outstanding. See generally *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 173-175 (1989). Had that motion been granted, however, petitioners would have lost the right to an immediate appeal of the district court's resolution of the RTC's claims against them. See Fed. R. Civ. P. 54(b) (absent certification by the district court, "any order or other form of decision * * * which adjudicates fewer than all the claims * * * of fewer than all the parties shall not terminate the action as to any of the claims or parties"). Petitioners made a tactical choice to waive their claim that Telstar was secondarily liable for the debt in order to obtain immediate review of the order adjudicating them primarily liable to the RTC. Because the jurisdiction of the court of appeals depended on that waiver, petitioners cannot reason-

ably complain about the court's failure to revive their claims against Telstar after their gamble proved unsuccessful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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